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In the Supreme Court of the United States

OCTOBER TERM, 1960

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

BRADEMAS IRON COMPANY

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

J. LEE RANKIN,
Solicitor General,
Department of Justice, Washington 25, D.C.

STUART ROTHMAN,
General Counsel,
DOMINICK L. MANOLI,
Associate General Counsel,
MARION J. COHEN,
Assistant General Counsel,
MARION L. GRIFFIN,
Attorney,
National Labor Relations Board, Washington 25, D.C.

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In the Supreme Court of the United States

OCTOBER TERM, 1960

No. —

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

BRANDMAN IRON COMPANY

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

The Solicitor General, on behalf of the National Labor Relations Board, petitions for a writ of certiorari to review the judgment of the Court of Appeals for the Sixth Circuit entered on June 1, 1960, modifying an order issued by the Board against Brandman Iron Company.

OPINIONS BELOW

The Board's decision and order (R. 13–19) [1] is unreported. The court of appeals filed no opinion in support of its original action. Its *per curiam* opinion denying the Board's motion for reconsideration (R. 22–23) is reported at 281 F. 2d 797.

[1] "R." refers to the separately bound Supplemental Appendix to this petition, which contains the entire certified record. No record was printed for use in the court of appeals.

JURISDICTION

The court of appeals entered its decree on June 1, 1960 (R. 19–21), and denied the Board's motion for reconsideration on August 15, 1960 (R. 22–24). A second Board motion for reconsideration, by the court *en banc*, was denied September 23, 1960 (R. 24). On November 3, 1960, Mr. Justice Stewart extended the time for filing a petition for certiorari to January 12, 1961. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1) and Section 10(e) of the National Labor Relations Act, as amended, 29 U.S.C. 160(e).

QUESTION PRESENTED

Whether the court of appeals has power under Section 10(e) of the National Labor Relations Act to modify an order entered by the National Labor Relations Board, where the respondent, in a settlement agreement, had consented to the order and to its enforcement by the court.

STATUTE AND RULE INVOLVED

The relevant provisions of Section 10 of the National Labor Relations Act (61 Stat. 146, as amended, 29 U.S.C. 160) and Section 101.9 of the Rules and Regulations and Statements of Procedure of the National Labor Relations Board (24 F.R. 9095) are set forth in Appendix A, *infra*, pp. 14–16.

STATEMENT

Following charges filed by the union,[2] the Regional Director of the Board issued a complaint against

[2] Teamsters, Chauffeurs, Warehousemen and Helpers Union Local No. 20.

respondent company alleging that it had violated Section 8(a) (1), (3) and (4) of the Act by: (1) discharging employees because they had engaged in union activities and submitted evidence to an agent of the Board; (2) interrogating employees concerning their union membership and activities; (3) offering wage increases and other benefits to employees if they would abandon activities in behalf of the charging union or any other labor organization and vote against the charging union or any other labor organization in a Board-conducted election; (4) threatening employees with discharge or other reprisals for engaging in union activities, voting for the charging union or any other labor organization, or giving evidence to agents of the Board (R. 1–6).

Thereafter, the respondent, the union, and the Regional Director entered into a settlement stipulation[3] by which respondent waived all further proceedings before the Board and agreed to the issuance of a Board order directing it to (R. 8–9):

> 1. Cease and desist from:
>
> (a) Discouraging membership in * * * [the Charging Union] or any other labor organization of its employees, by discharging or refusing to reinstate any of its employees or in any other manner discriminating in regard to hire or tenure of employment or any other term or condition of employment because of membership or activity in such labor organization;

[3] Such stipulations are provided for in Section 101.9 of the Board's statements of procedure, which is set forth in Appendix A, *infra*, pp. 15–16.

(b) Interrogating its employees concerning their union activities, sympathies, or affiliation, and threatening its employees with loss of employment, reduction in work hours, loss of benefits, and other reprisals because of such activities;

(c) Making promises of wage increases and other benefits to its employees if they should abandon and repudiate their activities, sympathies, affiliation and support of * * * [the Charging Union], or any other labor organization;

(d) Making promises of wage increases and other benefits to its employees if they should vote against the Charging Union or any other labor organization in an election conducted by the National Labor Relations Board; and

(e) In any other manner interfering with, restraining or coercing its employees in the exercise of their right to self-organization, to form labor organizations, to join or assist * * * [the Charging Union], or any other labor organization, to bargain collectively through representatives of their own choosing, and to engage in concerted activities for the purpose of collective bargaining or other mutual aid or protection.

Respondent further agreed (R. 9–10), by way of affirmative relief, to offer reinstatement to two employees; to reimburse three employees for back pay, in amounts ranging from $460 to $774; and to post notices of compliance.[4]

[4] The stipulation provided, however, that the portion of the complaint alleging that respondent had threatened employees with reprisals for giving evidence to Board agents, in violation of Section 8(a)(4), would be dismissed (R. 10–11).

In addition, the stipulation provided that "The United States Court of Appeals for any appropriate circuit may, upon application by the Board, enter its decree enforcing the order of the Board" issued in accordance with the stipulation, and that "The respondent waives all defenses to the entry of the decree * * *." (R. 11).

On January 7, 1960, the Board, approving the stipulation, entered an order following its terms in all respects, including the references to the charging union "or any other labor organization" quoted above (R. 13–17). On May 24, 1960, the Board, pursuant to the stipulation, petitioned the court below for a decree enforcing the order.

On June 1, the court of appeals, *sua sponte* and without opinion, modified the Board's order by striking the phrase "or any other labor organization" wherever it occurred, and, as so modified, enforced the order (R. 19–21). The Board filed a motion for reconsideration, which the court (Judge Cecil dissenting) denied on August 15 in a *per curiam* opinion (R. 22–23). The Board's motion for reconsideration of the ruling *en banc* was denied on September 23 (R. 24).

REASONS FOR GRANTING THE WRIT

1. The holding of the court below that it has power to modify an order which it believes is too broad, though the order was not contested before the Board, is contrary to Section 10(e) of the Act and decisions of this Court.

Section 10(e) of the Act (p. 15, *infra*) provides that "No objection that has not been urged before the Board * * * shall be considered by the

court * * *." The purpose of this provision is to give the reviewing court the benefit of the Board's views on disputed questions of fact and law, and hence, where such opportunity has not been afforded, it requires the court "to render judgment on consent as to all issues that were contestable before the Board but were in fact not contested" (*National Labor Relations Board* v. *Cheney California Lumber Co.*, 327 U.S. 385, 389). Nor is there any doubt that Section 10(e) applies to objections to the terms of the order entered by the Board no less than to those going to the Board's unfair labor practice findings. *National Labor Relations Board* v. *Cheney California Lumber Co.*, 327 U.S. 385, 388–389; *Marshall Field & Co.* v. *National Labor Relations Board*, 318 U.S. 253, 255–256; *National Labor Relations Board* v. *District 50, United Mine Workers of America*, 355 U.S. 453, 463–464; *National Labor Relations Board* v. *Seven-Up Bottling Co.*, 344 U.S. 344, 350. See also, *Federal Power Commission* v. *Colorado Interstate Gas Co.*, 348 U.S. 492, 496–501.

The *Cheney* case involved precisely the same kind of objection to a Board order as that involved here. In that case, the court of appeals, believing that the portion of the Board's order which banned the employer from "in any other manner" interfering with its employees' organizational rights was unjustified under *National Labor Relations Board* v. *Express Publishing Co.*, 312 U.S. 426, deleted that provision even though no objection to it had been filed with the Board. This Court, while recognizing that a court need not enforce an order "if the Board has patently

traveled outside the orbit of its authority so that there is, legally speaking, no order to enforce", concluded that a broad order was not in that category, for its propriety depended upon the circumstances of the particular case (327 U.S. at 388–389). Accordingly, Section 10(e) required that any complaint respecting the propriety of the order first be presented to the Board, and, if it had not been, the reviewing court was precluded from inquiring into the matter.[5]

Similarly here, the provision of the order which the court of appeals deleted was not "outside the orbit of [the Board's] authority," but proper under particular circumstances. If, for example, credited employee witnesses were to testify that the respondent threatened to discharge them for membership in the charging union or any other union, or that it threatened to close the plant if any union came in, an order employing the phrase "any other labor organization" would be manifestly appropriate.[6] And by consenting to the entry of the order, respondent in effect assumed that the facts warranted the order and waived its opportunity to have the Board pass on the ques-

[5] Chief Justice Stone, being of the view that Section 10(e) was not a limitation on "the court's power to conform its own process to accepted legal standards," specially concurred on the ground that the broad order was justified on the "merits" (327 U.S. at 389–391).

[6] *Communications Workers* v. *National Labor Relations Board*, 362 U.S. 479, relied on by the court below, does not hold to the contrary, but merely that, on the facts of that case, a broad order was unjustified. In that case, of course, the scope of the order was contested before the Board.

tion.[7] Therefore, here, as in *Cheney*, Section 10(e) barred the court from modifying the order on its own.[8] Indeed, since the complaint in this case specifically alleged that respondent had coerced its employees to abandon the charging union "or any other labor organization" (p. 3, *supra*), the court's action gratuitously presupposes that the Board could not prove the allegations of its complaint.

2. The view of the court below that it had power *sua sponte* to modify the Board's order in this case apparently stems from a belief that the decision of this Court in *Communications Workers* v. *National Labor Relations Board*, 362 U.S. 479, has authorized the reviewing court to exercise greater supervision over Board orders, even where they were not contested before the Board. This view is likewise reflected in the decision of the First Circuit in *National Labor Relations Board* v. *Ochoa Fertilizer Corp.*, 283 F. 2d 26, where that court made similar modifi-

[7] To be sure, in *Cheney* the case went to hearing and respondent then failed to file exceptions to the trial examiner's intermediate report recommending the order in question, whereas here respondent, at the outset, waived a hearing and consented to the entry of the order. That difference is of no relevance, however, for in both situations the effect of respondent's action was the same, i.e., to render the Board incapable of reviewing the factual basis for the order. That is, where no exceptions are filed to the trial examiner's intermediate report, Section 10(c) (see p. 14, *infra*) automatically makes his recommended order that of the Board, and, where there is consent to the entry of an order without a prior hearing, there is no record for the Board to review.

[8] Significantly, in its opinion denying rehearing (R. 23), the court below cited the concurring opinion of Chief Justice Stone in *Cheney* (see n. 5, *supra*).

cations in seven uncontested Board orders. On the other hand, in recent decisions not yet reported but set forth in Appendix B (pp. 17–23, *infra*), the Second Circuit, another panel of the Sixth Circuit, and the District of Columbia Circuit have all declined to modify orders which had been uncontested on the ground that such modification was barred by *Cheney*, which in their view was unaffected by *Communications Workers*. *National Labor Relations Board* v. *Combined Century Theatres*, 46 L.R.R.M. 2858 (C.A. 2, August 3, 1960); *National Labor Relations Board* v. *Murray Ohio Mfg. Co.*, 46 L.R.R.M. 2888 (C.A. 6, August 15, 1960); *Carpenters District Council of Detroit* v. *National Labor Relations Board*, No. 15604 (C.A.D.C., December 8, 1960). For the reasons previously given, we believe that the latter position is correct. It is appropriate that this Court grant certiorari in this case to resolve that conflict between and within[9] the circuits. The Board also

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[9] The intra-circuit conflict between the decisions of different panels of the Sixth Circuit in this case and in the *Murray* case is a particularly sharp one. In both cases the court had originally modified an uncontested Board order thought to be too broad, and in both cases the Board moved for reconsideration. The motions for reconsideration were both decided on the same day, August 15, 1960. Circuit Judges Cecil and Weick sat in both cases and were divided in both. In *Murray*, the third member of the panel, Judge Miller, joined Judge Cecil in reinstating the Board's original order without modification, Judge Weick dissenting (p. 19, *infra*). In the instant case, the third member of the panel was Judge Martin, who joined with Judge Weick in denying the motion for reconsideration, thus casting Judge Cecil in the dissenting role (R. 23). It was because of that conflict that the Board then moved for reconsideration *en banc*, but that motion was denied (R. 24).

intends to file similar petitions in some of the First Circuit cases.

3. Since this Court's decision in *Communications Workers* v. *N.L.R.B.*, 362 U.S. 479, the Board has attempted to insure that broad orders are used only in situations where they are justified by the facts of the particular case. See *Central Rigging and Contracting Corp.*, 129 NLRB No. 37; *Local Union 322, Lumber Drivers (Republic Wire Corp.)* 129 NLRB No. 45; *International Hod Carriers, Local 78 (Knowlton Construction Company)*, 129 NLRB No. 72. Accordingly, there is no reason to assume (cf. *National Labor Relations Board* v. *Ochoa Fertilizer Corp.*, 283 F. 2d 26, 31 (C.A. 1)) that, if the respondent in a consent case were to establish to the satisfaction of the Regional Director that a broad order was not warranted under the circumstances of the case, the Director would nevertheless insist upon such an order as a matter of course.[10] Moreover, if the respondent and the Regional Director cannot agree as to whether a broad order is appropriate, the respondent has the alternative of withholding his consent and requiring the Regional Director to establish the basis for such an order in a contested proceeding.

4. The consequence of the decision below is that no "broad" order, however appropriate in the particular circumstances, can be obtained by a consent procedure in which the parties stipulate to conclusions but not to subsidiary facts. Where a broad order is appropriate,

[10] The manual of instructions issued to Board field personnel states that "the remedy provided for in a settlement must not exceed that which would be expected from a fully favorable Board decision" (Sec. 10154).

the Board will be compelled, unless the respondent is also willing to stipulate to specific evidentiary facts, to go to contested litigation unwanted by both parties. Nor is the decision limited to broad orders, for its rationale would permit the court, *sua sponte*, to modify any other feature of a consent order which it did not deem proper. In view of the importance of consent orders to the Board's handling of its workload, such a rule would have a severe impact on the administration of the Act. See *Poole Foundry & Machinery Co.* v. *National Labor Relations Board*, 192 F. 2d 740, 742 (C.A. 4), certiorari denied 342 U.S. 954. Thus, during the last four fiscal years, approximately forty per cent of the unfair labor practice cases in which the Board issued a decision and order involved orders which were entered either with the express consent of the parties or summarily because of the absence of exceptions to the trial examiner's proposed order (see Section 10(c), p. 14, *infra*).[1] During approximately the same period, fifty per cent of the Board orders before the courts of appeals on petitions

[1] All unfair labor practice cases in which the Board issued decisions and orders

	Contested cases	Consent cases	No-exception cases	Total cases
1957	248	193	17	458
1958	353	210	42	605
1959	457	253	56	764
1960	544	244	99	887
Total	1,602	850	214	2,884

for enforcement or review were entered by the Board in similar fashion.[12]

The decision below is also out of harmony with the general policy of encouraging settlement agreements and avoiding costly and time-consuming litigation. See *National Labor Relations Board* v. *J. L. Hudson Co.*, 135 F. 2d 380, 383–384 (C.A. 6), certiorari denied, 320 U.S. 740; cf. Administrative Procedure Act, Sec. 5(b), 60 Stat. 239, 5 U.S.C. 1004(b). Moreover, it is contrary to the settled principle that the voluntary solution of the parties, particularly when embodied in an order or decree which there was both jurisdiction and power to enter, should not be rewritten by the court on review. See *Swift & Co.* v. *United States*, 276 U.S. 311, 328–329, 330–331; cf. *United States* v. *Wunderlich*, 342 U.S. 98, 100–101; *National Labor Relations Board* v. *Draper Corp.*, 159 F. 2d 294, 298–299 (C.A. 1).

[12] Unfair labor practice cases in which petitions for enforcement or review were filed in the courts of appeals:

	Contested cases	Consent cases	No-exception cases	Total cases
1957	72	90	7	169
1958	114	113	4	231
1959	75	178	9	342
1960 Jan.–Mar.	79	49	10	118
Total	440	410	30	880

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted.

J. LEE RANKIN,
Solicitor General.

STUART ROTHMAN,
General Counsel,
DOMINICK L. MANOLI,
Associate General Counsel,
NORTON J. COME,
Assistant General Counsel,
MARION L. GRIFFIN,
Attorney,
National Labor Relations Board.

JANUARY 1961.

APPENDIX A

Statute and Rule Involved

1. Section 10 of the National Labor Relations Act (61 Stat. 146, as amended, 29 U.S.C. 160) provides in part:

> Sec. 10 (a) The Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practice (listed in section 8) affecting commerce. This power shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, law, or otherwise: * * *
>
> * * * * *
>
> (c) * * * If upon the preponderance of the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action including reinstatement of employees with or without back pay, as will effectuate the policies of this Act: * * * In case the evidence is presented before a member of the Board, or before an examiner or examiners thereof, such member, or such examiner or examiners * * * shall issue * * * a proposed report, together with a recommended order, which shall be filed with the Board, and if no exceptions are filed within twenty days after service thereof * * * such recommended order shall become the order of the Board and become effective as therein prescribed.
>
> * * * * *

(c) The Board shall have power to petition any court of appeals of the United States * * * within any circuit * * * wherein the unfair labor practice in question occurred or wherein such person resides or transacts business, for the enforcement of such order and for appropriate temporary relief or restraining order, and shall file in the court the record in the proceedings, as provided in section 2112 of Title 28, United States Code. Upon the filing of such petition, the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to grant such temporary relief or restraining order as it deems just and proper, and to make and enter a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board. No objection that has not been urged before the Board, its member, agent, or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances. * * *

2. Section 101.9 of the Rules and Regulations and Statements of Procedure of the National Labor Relations Board (24 F.R. 9095) provides:

§ 101.9 *Settlement after issuance of complaint.*

(a) Even though formal proceedings have begun, the parties again have full opportunity at every stage to dispose of the case by amicable adjustment and in compliance with the law. Thus, after the complaint has been issued and a hearing scheduled or even begun, the attorney in charge of the case and the regional director afford all parties every opportunity for the submission and consideration of facts, argument, offers of settlement, or proposals of adjustment, except where time, the nature of the

proceeding, and the public interest do not permit.

(b) All settlement stipulations which provide for the entry of an order by the Board are subject to the approval of the Board in Washington, D.C. If the settlement provides for the entry of an order by the Board, the parties agree to waive their right to hearing and agree further that the Board may issue an order requiring the respondent to take action appropriate to the terms of the adjustment. Usually the settlement stipulation also contains the respondent's consent to the Board's application for the entry of a decree by the appropriate circuit court of appeals enforcing the Board's order.

(c) In the event the respondent fails to comply with the terms of a settlement stipulation, upon which a Board order and court decree are based, the Board may petition that court to adjudge the respondent in contempt. If the respondent refuses to comply with the terms of a stipulation settlement providing solely for the entry of a Board order, the Board may petition the court for enforcement of its order, pursuant to section 10 of the National Labor Relations Act.

APPENDIX B

Court of Appeals Decisions in Conflict With Decision Below

United States Court of Appeals for the Second Circuit

National Labor Relations Board, petitioner

v.

Combined Century Theatres, Inc., and International Alliance of Theatrical Stage Employees and Motion Picture Machine Operators of the United States and Canada, AFL-CIO, Local No. 640, et al., respondents.

Per Curiam:

Upon the motion of the General Counsel for the National Labor Relations Board, our decision of May 2, 1960 [278 F. 2d 306] is amended so as to grant enforcement to the Board's order of March 11, 1959, as well as to the supplemental order of June 22, 1959, considered in our May 2, 1960 opinion.

Respondents' cross motion that the order of March 11, 1959 be granted enforcement only upon modification is denied. Respondents ask that the Board's order be narrowed in scope so as to exclude from its prohibitions unlawful conduct directed at employers and unions other than those as to which evidence of violations of the National Labor Relations Act was introduced. We need not consider the merits of respondents' contention that the order is too broad in scope, for the order was entered by the Board pur-

suant to a stipulation between the General Counsel and the respondents; having so stipulated, respondents, of course, took no exception to the order before the Board nor, indeed, did they challenge its propriety upon the original argument before this Court. In the face of the stipulation, and in the absence of any exception to the order taken before the Board or the showing of any extraordinary circumstances, the Court will not consider respondents' objections. *NLRB* v. *District 50,* 355 U.S. 453, 464 (1958).

We do not understand the Supreme Court's recent decision in *Communications Workers* v. *NLRB,* 362 U.S. 479 (1960), upon which respondents rely, to express any jurisdictional limitation upon the Board's power, the excess of which we might consider even in the absence of proper exception, but rather to mean only that the evidence before the Board must be such as to justify not only the character but also the breadth of the Board's order. Questions as to the sufficiency of the evidence will, of course, be considered by the Court upon review of the order only if they have been appropriately preserved.

J. EDWARD LUMBARD,
U.S.C.J.

STANLEY N. BARNES,
U.S.C.J.

J. JOSEPH SMITH,
U.S.D.J.

AUGUST 3, 1960.

United States Court of Appeals for the Sixth Circuit

No. 14175

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

MURRAY OHIO MANUFACTURING COMPANY, LAWRENCEBURG, TENNESSEE, DIVISION, RESPONDENT

ORDER

Before MILLER, CECIL and WEICK, *Circuit Judges*

This day this cause came on to be heard upon the motion of the petitioner National Labor Relations Board to reconsider a former order of this Court by which it amended a decree for enforcement submitted by consent of the parties hereto.

Upon consideration whereof, the Court finds that there was no objection made at the hearing before the Board, by counsel for respondent, to the language stricken from the decree by the amendment, and that by reason thereof, under authority of *N.L.R.B.* v. *Cheney California Lumber Co.*, 327 U.S. 385, the motion should be sustained.

It is therefore ordered, adjudged and decreed that the motion for reconsideration be sustained, that the consent decree as originally submitted be reinstated without the amendment, and that it be enforced as so reinstated.

WEICK, Circuit Judge, dissents. He would deny the motion.

(S) LESTER L. CECIL,
Circuit Judge.

AUGUST 15, 1960.

United States Court of Appeals for the District of Columbia Circuit

No. 15604

CARPENTERS DISTRICT COUNCIL OF DETROIT, WAYNE, OAKLAND, MACOMB, SANILAC, ST. CLAIR AND MONROE COUNTIES AND VICINITY, UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA, AFL–CIO, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD, RESPONDENT

ON PETITION TO REVIEW AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD

Decided December 8, 1960

Before WILBUR K. MILLER, *Chief Judge*, and BAZELON and BURGER, *Circuit Judges*

BURGER, *Circuit Judge:* The petitioner asks us to set aside and the respondent asks us to enforce an order of the National Labor Relations Board which rested on findings that petitioner violated Sections 8(b)(2) and 8(b)(1)(A) of the National Labor Relations Act as amended, by causing employers to discriminate unlawfully in hiring practices. We have jurisdiction under Sections 10 (e) and (f) of the Act.

The Board's order requires petitioner to cease and desist from causing or attempting to cause the employer, W. J. C. Kaufman Company, or any other employer, to discriminate against employees or applicants for employment by requiring them to obtain work permits, clearances or job referrals from petitioner as a condition of employment or from in any like or related manner restraining or coercing employees or prospective employees of Kaufman Com-

pany or any other employer in the exercise of rights under Section 7 of the Act. Additionally, petitioner is required to make restitution to a particular job applicant, one Bissonnette, for loss of wages because of unlawful discrimination against him, and to post specified notices.

* * * * *

[Statement of facts and discussion of unfair labor practice findings omitted.]

(3)

The order is attacked by petitioner on the ground that it applies not only to the Kaufman Company but to "any other employer" and to practices committed in "any like or related manner." In light of the Examiner's finding that the Harrison-Bissonnette episode "at most, is proof only of an isolated and accidental application" of the constitution and working rules, the scope of the Board's order is difficult to understand.[2] *National Labor Relations Board* v. *Express Publishing Co.*, 312 U.S. 426, 433 (1941), tells us that "the authority conferred on the Board to restrain the practice which it has found * * * to have [been] committed is not an authority to restrain generally unlawful practices which it has neither found to have been pursued or persuasively to be related to the proven unlawful conduct."

However, it appears that no objection to the scope of the order was made before the Board. Exception was taken to the recommended order "insofar as * * * based on materials previously excepted to." But these exceptions all related to findings on dis-

[2] Petitioner's failure to raise this point to the Board is similarly puzzling. The Intermediate Report plainly put petitioner on notice with respect to the scope of the recommended order, and the Board adopted the recommendation.

crimination and agency. There were no findings as to the scope of the order; only the terms of the order describe its scope. Thus the exception taken "did not apprise the Board that petitioner intended to press the question now presented." *Marshall Field & Co.* v. *National Labor Relations Board*, 318 U.S. 253, 255 (1943).

Petitioner argues that even absent objection before the Board this court now has power to modify the order in this respect. We think not. Several circuits seem to have held the reviewing court may so act because the enforcement order is the order of *the court*, not the order of the Board. See *National Labor Relations Board* v. *Local 111, United Bhd. of Carpenters*, 278 F. 2d 823 (1st Cir. 1960); *National Labor Relations Board* v. *Brandman Iron Co.*, 281 F. 2d 797 (6th Cir. 1960). The Sixth Circuit appears to have relied upon Mr. Justice Stone's concurring opinion in *National Labor Relations Board* v. *Cheney California Lumber Co.*, 327 U.S. 385 (1946). Circuit Judge Cecil dissenting in the *Brandman* case relies on the majority view in the *Cheney* case and his premise would seem to be correct. This is also the view of the Second Circuit. *National Labor Relations Board* v. *Combined Century Theatres, Inc.*, No. J-2740, 2d Cir., August 3, 1960.

In *National Labor Relations Board* v. *District 50, UMW*, 355 U.S. 453 (1958), the Supreme Court set aside the action of this Circuit which modified a Board order by changing the wording of a notice, saying that no "extraordinary circumstances" were shown to bring the case within the exceptions allowed under the controlling statute defining the scope of review. See also *Federal Power Commission* v. *Colorado Interstate Gas Co.*, 348 U.S. 492, 497–501 (1955). Petitioner neither claims nor describes any

extraordinary circumstances which would appear to warrant our now modifying the scope of what might seem to be an order which goes beyond the needs of the case. We do not read *Express Publishing* or similar cases in the Supreme Court as do the First and Sixth Circuits. We read those cases as precluding modification of the order by us unless the party challenging the order shows that he is within the exception to the rule; appellant has not done so. The order of the Board will be enforced.

Affirmed.

BAZELON, *Circuit Judge*, dissenting [as to unfair labor practice findings]: * * *.

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JAN 12 1961
JAMES R. BROWNING, Clerk

No. [redacted], 33

In the Supreme Court of the United States

October Term, 1960

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

BRADEMAS IRON COMPANY

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

SUPPLEMENTAL APPENDIX TO PETITION FOR CERTIORARI

J. LEE RANKIN,
Solicitor General, Department of Justice,
Washington 25, D.C.

DOMINICK L. MANOLI,
Assistant General Counsel,
STANLEY M. GREENFIELD,
Attorneys,
National Labor Relations Board,
Washington 25, D.C.

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United States of America

National Labor Relations Board

Eighth Region

Case No. 8-CA-1905

BRANDMAN IRON COMPANY AND TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS UNION LOCAL NO. 20, AFFILIATED WITH INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA

COMPLAINT AND NOTICE OF HEARING

It having been charged by Teamsters, Chauffeurs, Warehousemen and Helpers Union Local No. 20, affiliated with International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America (hereinafter called the Charging Union) that Brandman Iron Company (hereinafter called Respondent) has been engaging in and is engaging in unfair labor practices affecting commerce as set forth and defined in the National Labor Relations Act, as amended, 61 Stat. 136 (herein called the Act), the General Counsel of the National Labor Relations Board (hereinafter called the Board), on behalf of the Board, by the undersigned Regional Director, issues this complaint and notice of hearing pursuant to Section 10(b) of the Act and Section 102.15 of the Board's Rules and Regulations, Series 7, as amended.

1. The charge herein was filed by the Charging Union against the Respondent on June 4, 1959, service by registered mail being made upon Respondent on June 6, 1959.

2. Respondent is and has been at all times material herein a partnership, organized and existing by virtue of the laws of the State of Ohio, with its principal offices and place of business located in Findlay, Ohio, where it is engaged in the sale of steel and scrap rubber and metal.

3. Respondent, in the course and conduct of its business operations at its Findlay, Ohio, location, annually ships products valued in excess of $100,000 to non-retail business concerns within the State of Ohio, each of which in turn annually ships products valued in excess of $50,000 directly to points outside the State of Ohio.

4. Respondent is engaged in commerce within the meaning of Section 2 (6) and (7) of the Act.

5. The Charging Union, Teamsters, Chauffeurs, Warehousemen and Helpers Union Local No. 20, affiliated with International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, is a labor organization within the meaning of Section 2(5) of the Act.

6(A). Respondent, through its officers, supervisors and agents, more particularly Peter Brandman, from on or about April 1, 1959, to date:

(a) Interrogated its employees concerning their union activities, sympathies, affiliation and membership, and threatened its employees with loss of employment, reduction in work hours, loss of benefits, and other reprisals because of such activities;

(b) Made promises of wage increases and other benefits to its employees if they should abandon and repudiate their activities, sympathies, affiliation and support of Teamsters, Chauffeurs, Warehousemen and Helpers Union Local No. 20, affiliated with International Brotherhood of Teamsters, Chauffeurs,

Warehousemen and Helpers of America, or any other labor organization;

(c) Threatened its employees with loss of employment and other reprisals if they should vote for the Charging Union or any other labor organization in an election conducted by the National Labor Relations Board;

(d) Made promises of wage increases and other benefits to its employees if they should vote against the Charging Union or any other labor organization in an election conducted by the National Labor Relations Board.

(B). Respondent, through its officers, supervisors and agents, more particularly Peter Brandman, from on or about April 17, 1959, to date, threatened its employees with loss of employment and other reprisals if they should give any statement, affidavit, testimony or evidence to agents of the National Labor Relations Board.

7. Respondent discharged employee Kenneth Patterson on or about May 18, 1959, employee Gilbert Salazar on or about May 19, 1959, and employee Manuel Ruiz on or about May 25, 1959.

8(A). Respondent, since on or about May 18, 1959, has failed and refused, and has continued to refuse to reinstate Kenneth Patterson to his former or substantially equivalent position or employment.

(B). Respondent, since on or about May 19, 1959, has failed and refused, and has continued to refuse to reinstate Gilbert Salazar to his former or substantially equivalent position or employment.

(C). Respondent, since on or about May 25, 1959, has failed and refused, and has continued to refuse to reinstate Manuel Ruiz to his former or substantially equivalent position or employment.

9. Respondent did discharge, and refused and failed to reinstate Kenneth Patterson, Gilbert Salazar and Manuel Ruiz for the reasons that:

(A). They had, or Respondent believed they had, joined, assisted or favored the Charging Union or engaged in other concerted activities for the purpose of collective bargaining and other mutual aid or protection, and

(B). They had, or Respondent believed they had, submitted statements, affidavits, testimony or evidence under the Act to an agent of the National Labor Relations Board.

10. By the acts described above in Paragraph 6 and the various sub-paragraphs thereof, and Paragraphs 7, 8 and 9 and the various sub-paragraphs thereof, and by each of said acts, Respondent did interfere with, restrain and coerce, and is interfering with, restraining and coercing its employees in the exercise of the rights guaranteed in Section 7 of the Act, and did thereby engage in and is engaging in unfair labor practices within the meaning of Section 8(a)(1) of the Act.

11. By the acts described above in Paragraphs 7 and 8, for the reasons set forth in Paragraph 9 and sub-paragraph (A) thereof, Respondent did discriminate and is discriminating in regard to the hire or tenure or terms or conditions of employment of the employees named above in Paragraph 7, thereby discouraging membership in the Charging Union, and Respondent did thereby engage in and is engaging in an unfair labor practice within the meaning of Section 8(a)(3) of the Act.

12. By the acts described above in Paragraphs 7 and 8, for the reasons set forth in Paragraph 9 and sub-paragraph (B) thereof, Respondent did discharge the employees named above in Paragraph 7 because

they had, or Respondent believed they had, given testimony under the Act, and Respondent did thereby engage in and is engaging in an unfair labor practice within the meaning of Section 8(a)(4) of the Act.

13. The activities of Respondent described above in Paragraphs 6, 7, 8 and 9, occurring in connection with the operations of Respondent described in Paragraphs 2, 3 and 4, have a close, intimate and substantial relation to trade, traffic and commerce among the several states and tend to lead to labor disputes burdening and obstructing commerce and the free flow of commerce.

14. The acts of Respondent described above constitute unfair labor practices affecting commerce within the meaning of Section 8(a) (1), (3) and (4) and Section 2 (6) and (7) of the Act.

PLEASE TAKE NOTICE that on the 21st day of September, 1959, at 10:00 a.m. Eastern Standard Time, in the Third Floor Jury Room, Hancock County Court House, Findlay, Ohio, a hearing will be conducted before a duly designated Trial Examiner of the National Labor Relations Board on the allegations set forth in the above Complaint, at which time and place you will have the right to appear in person, or otherwise, and give testimony.

You are further notified that, pursuant to Sections 102.20 and 102.21 of the Board's Rules and Regulations, the Respondent shall file with the undersigned Regional Director, acting in this matter as agent of the National Labor Relations Board, an original and four (4) copies of an answer to said Complaint within ten (10) days from the service thereof and that unless it does so all of the allegations in the Complaint shall be deemed to be admitted to be true and may be so found by the Board.

Wherefore, the General Counsel of the National Labor Relations Board, on behalf of the Board, has caused this Complaint and Notice of Hearing to be signed and issued by the Regional Director for the Eighth Region this 12th day of August, 1959.

(S) Philip Fusco,
PHILIP FUSCO,
Regional Director,
National Labor Relations Board, Eighth Region.

United States of America

National Labor Relations Board

Eighth Region

Case No. 8–CA–1905

BRANDMAN IRON COMPANY AND TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS UNION LOCAL NO 20, AFFILIATED WITH INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA

SETTLEMENT STIPULATION

IT IS HEREBY STIPULATED AND AGREED by and between Brandman Iron Company, hereinafter called the Respondent, Teamsters, Chauffeurs, Warehousemen and Helpers Union Local No. 20, affiliated with International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, hereinafter called the Charging Union, and the General Counsel of the National Labor Relations Board; that:

1. Upon a charge filed by the Charging Union on June 4, 1959, and served on the Respondent on June 6, 1959, receipt of which charge is hereby acknowledged by the Respondent, the General Counsel of the National Labor Relations Board, on behalf of the Na-

tional Labor Relations Board, hereinafter called the Board, by the Regional Director for the Eighth Region, acting pursuant to authority granted in Section 10(b) of the National Labor Relations Act, 61 Stat. 136, hereinafter called the Act, and Section 102.15 of the Board's Rules and Regulations, shall issue simultaneously with the execution of this Settlement Stipulation a Complaint and Notice of Hearing against the Respondent. Service by registered mail of true copies of said Complaint and Notice of Hearing is hereby acknowledged by the Respondent and the Charging Union.

2. The Respondent is and has been at all times material herein a partnership, organized and existing by virtue of the laws of the State of Ohio, with its principal offices and place of business located in Findlay, Ohio, where it is engaged in the sale of steel and scrap rubber and metal.

Respondent, in the course and conduct of its business operations at its Findlay, Ohio, place of business, annually ships products valued in excess of $100,000 to non-retail business concerns within the State of Ohio which in turn annually ship products valued in excess of $100,000 directly to points outside the State of Ohio. The Respondent admits that it is engaged in commerce within the meaning of Section 2, Subsections (6) and (7) of the Act.

3. Teamsters, Chauffeurs, Warehousemen and Helpers Union Local No. 20, affiliated with International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, herein called the Charging Union, is a labor organization within the meaning of Section 2(5) of the Act.

4. All parties hereto waive the filing of answer, hearing, intermediate report of Trial Examiner, the filing of expections and briefs, oral argument before

the Board, the making of findings of fact or conclusions of law by the Board, and all further and other procedure to which the parties may be entitled under the Act or the Rules and Regulations of the Board.

5. This Stipulation together with the charge and Complaint and Notice of Hearing shall constitute the entire record herein.

6. Upon this Stipulation and the record herein as described in Paragraph 5 hereof, and without any further notice of proceedings herein, the Board may enter an order forthwith providing as follows:

The Respondent Brandman Iron Company, its officers, agents and assigns shall:

1. Cease and desist from:

(a) Discouraging membership in Teamsters, Chauffeurs, Warehousemen and Helpers Union Local No. 20, affiliated with International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, or any other labor organization of its employees, by discharging or refusing to reinstate any of its employees or in any other manner discriminating in regard to hire or tenure of employment or any other term or condition of employment because of membership or activity in any such labor organization;

(b) Interrogating its employees concerning their union activities, sympathies, or affiliation, and threatening its employees with loss of employment, reduction in work hours, loss of benefits, and other reprisals because of such activities;

(c) Making promises of wage increases and other benefits to its employees if they should abandon and repudiate their activities, sympathies, affiliation and support of Teamsters, Chauffeurs, Warehousemen and Helpers Union Local No. 20, affiliated with International Brotherhood of Teamsters, Chauffeurs, Ware-

housemen and Helpers of America, or any other labor organization;

(d) Making promises of wage increases and other benefits to its employees if they should vote against the Charging Union or any other labor organization in an election conducted by the National Labor Relations Board; and

(e) In any other manner interfering with, restraining or coercing its employees in the exercise of their right to self-organization, to form labor organizations, to join or assist Teamsters, Chauffeurs, Warehousemen and Helpers Union Local No. 20, affiliated with International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, or any other labor organization, to bargain collectively through representatives of their own choosing, and to engage in concerted activities for the purpose of collective bargaining or other mutual aid or protection.

2. Take the following affirmative action to effectuate the policies of the National Labor Relations Act:

(a) Offer to the following employees immediate and full reinstatement to their former or substantially equivalent positions, without prejudice to any seniority or other rights and privileges previously enjoyed, and make them whole for any loss of pay they may have suffered by reason of the discrimination against them, by payment to them of the amounts set opposite their respective names:

Gilbert Salazar	$460.44
Manuel Ruiz	$774.50

Make Kenneth Patterson whole for any loss of pay he may have suffered by reason of the discrimination against him by payment to him of the Sum of $469.51. The said Kenneth Patterson has declined an offer of reinstatement to his former position;

(b) Post immediately in conspicuous places throughout its Findlay, Ohio, place of business copies of the Notice to All Employees attached hereto and marked "Appendix A." Copies of the said notice to be furnished by the Regional Director for the Eighth Region shall, after being signed by the Respondent's representative, be posted immediately upon receipt thereof and maintained for 60 consecutive days thereafter in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to insure that said notices are not altered, defaced or covered by any other material;

(c) Notify the Regional Director for the Eighth Region in writing within 10 days from the date of this order, what steps the Respondent has taken to comply herewith.

7. All parties hereto agree that upon execution and approval of this Settlement Stipulation, Paragraph 6(B) of the Complaint alleging that Respondent, through its officers, supervisors and agents, more particularly Peter Brandman, from on or about April 17, 1959, to date, threatened its employees with loss of employment and other reprisals if they should give any statement, affidavit, testimony or evidence to agents of the National Labor Relations Board; and that Paragraph 9(B) of the Complaint alleging that the above-mentioned employees had, or Respondent believed they had, submitted statements, affidavits, testimony or evidence under the Act to an agent of the National Labor Relations Board; and that Paragraph 12 of the Complaint alleging that by the acts described in Paragraphs 7 and 8, for the reasons set forth in Paragraph 9 and Sub-paragraph (B) thereof, Respondent did discharge the employees named above

in Paragraph 7 because they had, or Respondent believed they had, given testimony under the Act, and Respondent did thereby engage in and is engaging in an unfair labor practice within the meaning of Section 8(a)(4) of the Act; and also that portion of Paragraph 14 of the Complaint alleging violation of 8(a)(4), may be dismissed by the Regional Director, Eighth Region, National Labor Relations Board, and it is hereby requested by all the parties hereto that such action be taken.

8. The United States Court of Appeals for any appropriate circuit may, upon application by the Board, enter its decree enforcing the order of the Board in the form set forth in Paragraph 6 hereof. The Respondent waives all defenses to the entry of the decree, including compliance with the order of the Board, and its right to receive notice of the filing of an application for the entry of such decree, provided that the decree is in the words and figures set forth in Paragraph 6 hereof. However, the Respondent shall be required to comply with the affirmative provisions of the Board's order after entry of the decree only to the extent that it has not already done so.

9. This stipulation contains the entire agreement between the parties, there being no agreement of any kind, verbal or otherwise, which varies, alters or adds to it.

10. This stipulation, together with the other documents constituting the record as described in Paragraph 5 hereof, shall be filed with the Board. The stipulation is subject to the approval of the Board, and it shall be of no force and effect until the Board has granted such approval. Upon the Board's approval of the stipulation, the Respondent will im-

mediately comply with the provisions of the order as set forth in Paragraph 6 hereof.

Signed at Toledo, Ohio, October 28th, 1959.

BRANDMAN IRON COMPANY
By: (S) Richard S. Cole, *Attorney,*
1434 National Bank Bldg., Toledo, Ohio

Signed at Toledo, Ohio, October 28, 1959.

TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS UNION LOCAL NO. 20, AFFILIATED WITH INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA

By: (S) Jack Gallon, *Attorney,*
435 S. Hawley St., Toledo, Ohio

Approval by the General Counsel recommended.

(S) John Kollar,
JOHN KOLLAR,
Attorney, Eighth Region, National Labor Relations Board, 720 Bulkley Building, 1501 Euclid Avenue, Cleveland 15, Ohio

Date: October 28, 1959.

Approved:

GERALD P. LEICHT,
Office of the General Counsel, National Labor Relations Board, Washington 25, D.C.

Date: November 19, 1959.

APPENDIX A

Notice to All Employees

[Omitted in printing—identical to notice at pp. 17–19, *infra.*]

United States of America

Before the National Labor Relations Board

Case No. 8-CA-1905

BRANDMAN IRON COMPANY AND TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS UNION LOCAL NO. 20, AFFILIATED WITH INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA

DECISION AND ORDER

Statement of the case

On October 28, 1959, Brandman Iron Company, herein called the Respondent; Teamsters, Chauffeurs, Warehousemen and Helpers Union Local No. 20, affiliated with International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, herein called the Charging Union; and the General Counsel of the National Labor Relations Board, herein called the Board, entered into a Settlement Stipulation, subject to approval of the Board, providing for the entry of a consent order by the Board, and a consent decree by any appropriate United States Court of Appeals. The parties waived all further and other procedure before the Board to which they may be entitled under the Act, and the Rules and Regulations of the Board, and Respondent waived its right to contest the entry of a consent decree or to receive further notice of the application therefor.

The aforesaid Settlement Stipulation is hereby approved and made a part of the record herein, and the proceeding is hereby transferred to and continued before the Board for the entry of a Decision and Order pursuant to the provisions of the said Settlement Stipulation.

Pursuant to the provisions of Section 3(b) of the Act, the Board has delegated its powers in connection with this proceeding to a three-member panel.

Upon the basis of the aforesaid Settlement Stipulation and the entire record in the case, the Board makes the following:

Findings of fact

1. The business of the Respondent

The Respondent, a partnership, organized and existing by virtue of the laws of the State of Ohio, with its principal offices and place of business located in Findlay, Ohio, is engaged in the sale of steel and scrap rubber and metal.

In the course and conduct of its business operations at its Findlay, Ohio, place of business, Respondent annually ships products valued in excess of $100,000 to nonretail business concerns within the State of Ohio which in turn annually ship products valued in excess of $100,000 directly to points outside the State of Ohio. Respondent admits, and we find, that it is engaged in commerce within the meaning of the Act.

2. The labor organization involved

Teamsters, Chauffeurs, Warehousemen and Helpers Union Local No. 20, affiliated with International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, is a labor organization within the meaning of Section 2(5) of the Act.

ORDER

Upon the basis of the above findings of fact, the Settlement Stipulation and the entire record in the

case, and pursuant to Section 10(c) of the National Labor Relations Act, the National Labor Relations Board hereby orders that:

The Respondent Brandman Iron Company, its officers, agents and assigns shall:

1. Cease and desist from:

(a) Discouraging membership in Teamsters, Chauffeurs, Warehousemen and Helpers Union Local No. 20, affiliated with International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, or any other labor organization of its employees, by discharging or refusing to reinstate any of its employees or in any other manner discriminatin_ in regard to hire or tenure of employment or any other term or condition of employment because of membership or activity in any such labor organization;

(b) Interrogating its employees concerning their union activities, sympathies, or affiliation, and threatening its employees with loss of employment, reduction in work hours, loss of benefits, and other reprisals because of such activities;

(c) Making promises of wage increases and other benefits to its employees if they should abandon and repudiate their activities, sympathies, affiliation and support of Teamsters, Chauffeurs, Warehousemen and Helpers Union Local No. 20, affiliated with International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, or any other labor organizations;

(d) Making promises of wage increases and other benefits to its employees if they should vote against the Charging Union or any other labor organization in an election conducted by the National Labor Relations Board; and

(c) In any other manner interfering with, restraining or coercing its employees in the exercise of their right to self-organization, to form labor organizations, to join or assist Teamsters, Chauffeurs, Warehousemen and Helpers Union Local No. 20, affiliated with International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, or any other labor organization, to bargain collectively through representatives of their own choosing, and to engage in concerted activities for the purpose of collective bargaining or other mutual aid or protection.

2. Take the following affirmative action which the Board finds will effectuate the policies of the Act:

(a) Offer to the following employees immediate and full reinstatement to their former or substantially equivalent positions, without prejudice to any seniority or other rights and privileges previously enjoyed, and make them whole for any loss of pay they may have suffered by reason of the discrimination against them, by payment to them of the amounts set opposite their respective names:

Gilbert Salazar	$460.44
Manuel Ruiz	$774.50

Make Kenneth Patterson whole for any loss of pay he may have suffered by reason of the discrimination against him by payment to him of the sum of $469.51. The said Kenneth Patterson has declined an offer of reinstatement to his former position;

(b) Post immediately in conspicuous places throughout its Findlay, Ohio, place of business copies of the Notice to all Employees attached hereto and marked "Appendix A." Copies of the said notice to be furnished by the Regional Director for the Eighth Region shall, after being signed by the Respondent's

representative, be posted immediately upon receipt thereof and maintained for 60 consecutive days thereafter in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to insure that said notices are not altered, defaced or covered by any other material;

(c) Notify the Regional Director for the Eighth Region, in writing, within ten (10) days from the date of this Order, what steps the Respondent has taken to comply.

Dated, Washington, D.C., Jan. 7, 1960.

BOYD LEEDOM,
Chairman

STEPHEN S. BEAN,
Member

JOSEPH ALTON JENKINS,
Member

National Labor Relations Board

[SEAL]

APPENDIX A

Notice to all employees

PURSUANT TO a Decision and Order of the National Labor Relations Board, based upon a stipulation providing for a consent court decree in an appropriate circuit of the United States Court of Appeals, and in order to effectuate the policies of the National Labor Relations Act, we hereby notify our employees that:

WE WILL NOT discourage our employees from membership in TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS UNION LOCAL NO. 20, affiliated with INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA, or any other labor organi-

zation, by discriminatorily discharging any of our employees or in any other manner discriminate in regard to their hire or tenure of employment or any term or condition of their employment because of their membership or activity in the above-named Union or any other labor organization.

WE WILL NOT interrogate our employees concerning their union activities, sympathies, affiliation or membership.

WE WILL NOT threaten our employees with loss of employment, reduction in work hours or loss of other benefits because of their union activities, sympathies, affiliation or membership.

WE WILL NOT make promises of wage increases and other benefits to our employees for the purpose of causing them to abandon and repudiate their union activities, sympathies, affiliation and membership and vote against the above-named Union or any other labor organization.

WE WILL NOT in any other manner interfere with, restrain or coerce our employees in the exercise of their right to self-organization, to form labor organizations, to join or assist the above-named Union, or any other labor organization, to bargain collectively through representatives of their own choosing and to engage in concerted activities for the purpose of collective bargaining or other mutual aid or protection and to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in Section 8(a)(3) of the Act.

WE WILL offer to the employees named below immediate and full reinstatement to their former or substantially equivalent positions, without prejudice to any seniority or other rights and privileges previously enjoyed, and make them whole for any loss of pay they may have

suffered by reason of the discrimination against them, by payment to them of the amounts set opposite their respective names;

Gilbert Salazar ---------- $460.44
Manuel Ruiz ---------- $774.50

WE WILL make Kenneth Patterson whole for any loss of pay he may have suffered by reason of the discrimination against him by payment to him of the sum of $469.51. The said Kenneth Patterson has declined an offer of reinstatement to his former position.

All our employees are free to become or remain members of the above-named Union or any other labor organization.

BRANDMAN IRON COMPANY
(Employer)

Dated ---------- By ----------
(Representative) (Title)

This notice must remain posted for 60 days from the date hereof, and must not be altered, defaced, or covered by any other material.

United States Court of Appeals for the Sixth Circuit

14238

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

BRANDMAN IRON COMPANY, RESPONDENT

Filed June 1, 1960, Carl W. Reuss, Clerk.
Before: MARTIN, CECIL and WEICK, Circuit Judges.

DECREE

THIS CAUSE came on to be heard upon the petition of the National Labor Relations Board for the en-

forcement of a certain order issued by it against the Respondent Brandman Iron Company, its officers, agents and assigns on January 7, 1960, in a proceeding before the said Board numbered 8–CA–1905; upon the transcript of the record in said proceeding, certified and filed in this Court, and upon a settlement stipulation providing for the entry of a consent decree of this Court enforcing the order as amended by the Court.

ON CONSIDERATION WHEREOF, it is ordered, adjudged and decreed by the United States Court of Appeals for the Sixth Circuit that the said order of the National Labor Relations Board be, and the same is hereby enforced, as amended, that Respondent Brandman Iron Company, its officers, agents and assigns abide by and perform the directions of the Board, in said order as amended contained.

(S) Paul C. Weick,
Judge, United States Court of Appeals
for the Sixth Circuit

Entry consented to this 29th day of April, 1960.
(S) Marcel Mallet-Prevost
MARCEL MALLET-PREVOST
Assistant General Counsel,
National Labor Relations Board

Entry consented to this day of
(S) Richard S. Cole
Counsel for Respondent

A true copy.
Teste:
(S) Carl W. Reuss, *Clerk, U.S. Court of Appeals*
for the Sixth Circuit
By: Mary M. McAfee,
D.C.

OFFICE OF THE CLERK

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

CINCINNATI 2, OHIO, June 1, 1960

Carl W. Reuss, *Clerk*

NATIONAL LABOR RELATIONS BOARD,
Washington 25, D.C.

Re: National Labor Relations Board v. Brandman Iron Company, No. 14,238.

GENTLEMEN:

Enclosed is an attested copy of the consent decree which was amended by the Court and entered today in the above case. Copies of this amended decree have also been mailed to counsel.

We are returning to you herewith the certified record in this case and call your attention to the amendments that the Court has made in the Board's decision and order of January 7, 1960. These amendments consist in striking the words "or any other labor organization of its employees" where ever they appear in the Board's order. The Court feels that the Board's order was too broad since the only Union involved in the instant case is the Teamsters, Chauffeurs, Warehousemen and Helpers Union Local No. 20.

Yours very truly,

CARL W. REUSS, *Clerk.*

(S) MARY M. MCAFEE, *Deputy Clerk.*

United States Court of Appeals for the Sixth Circuit

No. 14238

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

BRANDMAN IRON COMPANY, RESPONDENT

ON MOTION FOR RECONSIDERATION

Decided August 15, 1960

Before: MARTIN, CECIL and WEICK, Circuit Judges.

PER CURIAM. The Court, sua sponte, struck from the Order of the Board sought to be enforced, the language "or any other labor organization."

We are asked to reconsider our ruling. It is pointed out that the Order of the Board was consented to by the respondent who also stipulated that the decree could be entered thereon by this Court. Also that the complaint filed before the Board contained the language "or any other labor organization." No evidence was offered either before the Board or the Court.

The only union involved before the Board was Teamsters, Chauffeurs, Warehousemen and Helpers Union, Local No. 20. No other union had filed a complaint against the employer.

A somewhat similar question is involved in another case pending in this Court, namely, *National Labor Relations Board* v. *Murray Ohio Manufacturing Co.*, No. 14,175, which leads us to believe that the practice of entering so-called "broad" orders is not at all uncommon.

In striking out the language we believed objectionable, we acted on the authority of *Communication Workers of America* v. *N.L.R.B.*, 362 U.S. 479. Cf.

N.L.R.B. v. *Local 926, International Union of Operating Engineers,* 267 F. 2d 418 (C.A. 5).

While the *Communication Workers* case involved the language "or any other employer" and the present case "or any other labor union," we think this is a distinction without a difference. If it should become necessary to enforce the Court's order by contempt proceedings, the question may very well be presented as to the power of the Board or the Court to enter orders protecting unions or employers who were not parties to the proceedings.

Even though no objection was made to the decree, as we see it there is a duty on the Court to carefully examine all decrees submitted and to fashion them, if necessary, in accordance with accepted legal standards. The Court is under no mandatory requirement to enter a decree in whatever form it may be presented because the parties have consented. See concurring opinion of Justice Stone in *N.L.R.B.* v. *Cheney Lumber Co.,* 327 U.S. 385, 389–391; *Hecht* v. *Bowles,* 321 U.S. 321.

The motion for reconsideration is denied.

CECIL, Circuit Judge, dissents. I would sustain the motion on the authority of *N.L.R.B.* v. *Cheney California Lumber Co.,* 327 U.S. 385.

United States Court of Appeals for the Sixth Circuit

No. 14,238

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

BRANDMAN IRON COMPANY, RESPONDENT

ORDER

Filed Aug. 15, 1960, Carl W. Reuss, *Clerk.*

Before: MARTIN, CECIL and WEICK, Circuit Judges.

IT IS ORDERED that the motion for reconsideration filed by the National Labor Relations Board be and it is denied. Judge Cecil dissents.

Approved for entry:

(s) Paul C. Weick,
United States Circuit Judge.

A true copy.
Attest: CARL W. REUSS, *Clerk.*
by MARY M. MCAFEE, *Deputy Clerk.*

ORDER ON MOTION FOR RECONSIDERATION EN BANC

Before: MARTIN, CECIL and WEICK, Circuit Judges.

The Motion of the National Labor Relations Board that the Court Reconsider En banc its order issued on August 15, 1960 is hereby denied.

Approved for entry:

(s) Paul C. Weick,
United States Circuit Judge.

Filed Sept. 23, 1960, CARL W. REUSS, *Clerk.*

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In the Supreme Court of the United States

OCTOBER TERM, 1960

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

BRANDTJAN IRON COMPANY

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

SUPPLEMENTAL MEMORANDUM FOR THE NATIONAL LABOR RELATIONS BOARD

ARCHIBALD COX,
Solicitor General,
Department of Justice, Washington 25, D.C.

STUART ROTHMAN,
General Counsel,
National Labor Relations Board,
Washington 25, D.C.

In the Supreme Court of the United States

OCTOBER TERM, 1960

No. 646

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

BRANDMAN IRON COMPANY

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

SUPPLEMENTAL MEMORANDUM FOR THE NATIONAL LABOR RELATIONS BOARD

In the petition, we indicated that the views of the court below, although in agreement with those of the First Circuit in the *Ochoa* and related cases, were contrary, *inter alia*, to those of the Second Circuit in *Combined Century Theatres* (Pet. 9, 17–19). Subsequent to the filing of the petition, the Second Circuit had occasion to reconsider the problem in the light of the intervening decisions of the court below in this case and of the First Circuit in *Ochoa*, and decided to adhere to its earlier view that the reviewing court lacked power to modify an order which was uncontested before the Board. *National Labor Relations*

Board v. *Enterprise Association*, January 30, 1961. For the convenience of the Court, we set forth in the Appendix, pp. 3–4, *infra*, the Second Circuit's *per curiam* opinion in that case.[1]

Respectfully submitted,

ARCHIBALD COX,
Solicitor General.

STUART ROTHMAN,
General Counsel,
National Labor Relations Board.

FEBRUARY 1961.

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[1] The case involved a situation similar to that in *National Labor Relations Board* v. *Local 476, United Association*, petition for certiorari pending, No. 656, this Term. That is, the Board found a violation of the secondary boycott provision, Section 8(b)(4)(A). The Second Circuit, although sustaining the finding of a violation, modified the breadth of the order although no exceptions were filed (47 LRRM 2189, November 25, 1960). The Board petitioned for rehearing on the ground that, since no exceptions had been filed with the Board concerning the scope of the order, the modification was beyond the court's power. The Second Circuit, unlike the First Circuit in *Local 476*, reversed itself and enforced the order in its original form.

APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 26186

NATIONAL LABOR RELATIONS BOARD,

Petitioner,

v.

ENTERPRISE ASSOCIATION OF STEAM, HOT WATER, HYDRAULIC, SPRINKLER, PNEUMATIC TUBE, ICE MACHINE AND GENERAL PIPEFITTERS OF NEW YORK AND VICINITY, LOCAL UNION NO. 638, OF THE UNITED ASSOCIATION OF JOURNEYMEN AND APPRENTICES OF THE PLUMBING AND PIPEFITTING INDUSTRY OF THE UNITED STATES AND CANADA, AND MICHAEL F. DALY, ITS AGENT.

Respondents.

Decided January 30, 1961

Before:

HINCKS, WATERMAN AND MOORE,

Circuit Judges.

On Petition for Rehearing

PER CURIAM:

Since the respondents did not except to the breadth of the order recommended by the Trial Examiner, the order adopted by the Board should not have been modified because of its breadth. In providing for

enforcement petitions by the Board to the courts of appeal, Congress expressly limited the scope of judicial review. It cautioned: "No objection that has not been urged before the Board, its member, agent, or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances." Sec. 10(e) of the National Labor Relations Act, as amended, 29 U. S. C. A. § 160(e). In cases involving the breadth of orders of the Board, this limitation was recognized by this court in *N. L. R. B.* v. *Steel, etc., Fabricators, Local 810, Int'l Bhd. of Teamsters,* 253 F. 2d 832, 834, and in *Precision Fabricators* v. *N. L. R. B.,* 204 F. 2d 567, and indeed, is required by *N. L. R. B.* v. *District 50, United Mine Workers of America,* 355 U. S. 453. The decision in *Communications Workers* v. *N. L. R. B.,* 362 U. S. 479, is not to the contrary. It does not there appear that the breadth of the order which the court narrowed had not been objected to before the Board and the brief, unanimous, *Per Curiam* opinion contains nothing to suggest that the court intended to overrule its recent holding in *N. L. R. B.* v. *District 50, United Mine Workers of America, supra,* also a unanimous decision.

We note that in *N.L.R.B.* v. *Ochoa Fertilizer Corporation,* 1 Cir., 283 F. 2d 26, and *N.L.R.B.* v. *Brandman Iron Co.,* 6 Cir., 281 F. 2d 797, those courts assumed to narrow orders not objected to before the Board. But those cases seem not to reconcile the action taken with the jurisdictional limitation of Sec. 10(e) or with the Supreme Court decision cited above. We will therefore adhere to our earlier decisions.

Accordingly, the last paragraph of our opinion of November 25, 1960 is withdrawn and the order will be enforced without modification.

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